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Supreme Court of the United States.

OCTOBER TERM, 1946.

No. 1276.

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
against
ALDRED INVESTMENT TRUST ET AL.,
Defendants.

APPLICATION OF J. N. WELCH, R. A. B. COOK AND LOUIS BERNSTEIN FOR ALLOWANCE OF FEES,
Respondents.

APPLICATION OF GEORGE B. ROWLINGS FOR ALLOWANCE OF FEES,
Respondent.

FRANK BAILEY ET AL.,
Intervenors-Petitioners.

BRIEF FOR RESPONDENTS J. N. WELCH, R. A. B. COOK AND LOUIS BERNSTEIN, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This brief is submitted in behalf of the respondents J. N. Welch, R. A. B. Cook and Louis Bernstein in opposition to the petition for writ of certiorari filed herein by

Frank Bailey *et al.* in so far as it seeks a review in this Court of the allowance of $75,000 for counsel fees and expenses awarded to the respondents by the United States District Court for the District of Massachusetts, and unanimously affirmed by the United States Circuit Court of Appeals for the First Circuit.

Opinions Below.

The District Judge rendered an oral opinion on May 8, 1946 (R. 88), awarding this allowance to the respondents.

The Circuit Court of Appeals for the First Circuit filed a written opinion on February 24, 1947, affirming the aforesaid award to the respondents (R. 242).

Jurisdiction.

Petitioners apply for a writ of certiorari to review the award of compensation to the respondents under Section 240(a) of the Judicial Code.

The respondents respectfully submit that no question of law is presented on the petition to this Court, the allowance having been made to the respondents by the District Court in the exercise of its discretion and the Circuit Court of Appeals having affirmed such exercise of discretion and held that there was no abuse of discretion on the part of the District Court, and accordingly this Court should dismiss or deny the petition for a writ of certiorari herein to review the aforesaid judgment of the Circuit Court.

Facts.

On October 1, 1941, Gordon B. Hanlon bought at public auction 110,000 common shares of the Aldred Investment

Trust. That purchase gave him voting control of the Trust, with power to elect and remove trustees and officers, to fix the compensation of the latter and to dominate its policies (R. 4). In February, 1944, the Trustees of Aldred Investment Trust, then dominated by Hanlon, purchased the majority of the outstanding shares of the Eastern Racing Association.

On March 8, 1944, a complaint was filed in the District Court by respondents Cook and Bernstein as counsel for Charles F. Stratton, owner of certain debentures and shares, against Aldred Investment Trust and its trustees and officers, charging that the Trust was hopelessly insolvent; that there was gross and wanton waste in the management of the business and affairs of the Trust and gross and wanton abuse of trust on the part of the officers and trustees. The complainant prayed for the appointment of a receiver to take over the assets and liquidate the Trust, and for an injunction to restrain the officers and trustees from interfering with the receiver in the management and direction of the affairs of the Trust (R. 97).

An answer was filed on April 25, 1944, denying any such mismanagement and abuse of trust, and alleging that the complainant was entitled neither to the appointment of a receiver nor to the liquidation of the Trust (R. 98). Depositions were taken on June 1, 2 and 6, 1944, and the trial on the merits took place on June 8, 9, 15, 16 and 20, 1944. The testimony taken in the Stratton case, exclusive of exhibits, covers approximately 385 printed pages.

At the conclusion of the trial of the Stratton case, decision was reserved by the District Court until after the trial of a similar suit, filed on May 19, 1944, by the Securities and Exchange Commission against Aldred Investment Trust and its trustees and officers.

The S.E.C. case was tried on January 2, 3 and 4, 1945. At that trial, under a stipulation entered into by the par-

ties, all the testimony, depositions and exhibits received in evidence in the Stratton case were incorporated into and added to the testimony presented in the S.E.C. case.

After the trial of the S.E.C. case, the District Court found the officers and trustees guilty of misconduct and gross abuse of trust, and appointed receivers with power either to reorganize or to liquidate the Trust (58 Fed. Sup. 724). In the light of such determination, the District Court found it unnecessary to pass upon the merits of the Stratton case because it stated that the relief prayed for in that case had been fully granted in the S.E.C. case.

Upon appeal by the defendants in the S.E.C. case, the respondents herein filed a brief *amici curiae* in support of the judgment of the District Court. The Circuit Court of Appeals for the First Circuit affirmed the judgment of the District Court (151 F. 2d, 254).* A petition for writ of certiorari was denied by this Court (326 U.S. 795).

Although the Trust was hopelessly insolvent at the time this litigation began, the assets have risen in value so that it now has cash and securities of a market value of $8,590,-750, or $2,690,750 in excess of the aggregate par value of $5,900,000 of the outstanding debentures of the Trust (R. 141). As a result of such increase in value, debenture holders will receive not only the full face amount of their debentures, but also a substantial payment on account of their shares of beneficial interest.

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*In footnote 2 at page 255 of its opinion, the Circuit Court of Appeals said:

> "In a companion proceeding brought by Charles F. Stratton, a holder of Aldred Trust debentures, on behalf of himself and the other security holders, seeking the appointment of receivers and the liquidation of the Trust, the court below found it unnecessary to pass on the merits of the case since the relief sought was fully granted in the S.E.C. proceeding and dismissed the bill without prejudice. All the evidence in the Stratton case, which was tried first, was incorporated by reference in the instant case."

The petitioners first became interested in this situation when they purchased Mr. Hanlon's shares in the Aldred Investment Trust, shortly before this Court denied certiorari in 1946.

Subsequently, the District Court allowed a petition by Stratton, the plaintiff in *Stratton* v. *Aldred Investment Trust et al.*, to intervene in the proceedings of the S.E.C. case and to file a petition for allowance of reasonable compensation to counsel for Stratton for services rendered and disbursements incurred.

At the Court hearing on allowances, Mr. Welch stated that his associates began work in this matter in 1942, and sometime later he became associated with them, and that the combined time of himself and his associates spent on this work approximated 2100 hours (R. 74). At this hearing, counsel for the Securities and Exchange Commission agreed that Mr. Welch and his colleagues were entitled to compensation, and that the amount was discretionary with the Court (R. 85). The two attorneys for the Securities and Exchange Commission stated:

> "Mr. Kelly: • • •
>
> "At the outset, if the court please, in order to make the position of the Commission clear, we recognize that the allowance of any fees and the amount of any fees that would be allowed is a matter within the sound judicial discretion of your Honor." (R. 82.)
>
> "Mr. Cashion: If your Honor please, in regard to the claims for fees by Mr. Welch, Mr. Cook and Mr. Bernstein, and also Mr. Rowlings, I want to make the statement that we feel that Mr. Welch and his colleagues made a very substantial contribution to the Securities and Exchange Commission case." (R. 84.)

• • • • • • •

"The Court: You don't care to translate any of that into dollars and cents?

"Mr. Cashion: No, that is within your Honor's discretion, as Mr. Kelly said." (R. 85.)

At this hearing, counsel for the petitioners herein recognized the right of respondents to receive reasonable compensation for their services, stating:

"Mr. Kaufman: If your Honor please, we recognize very well that Mr. Welch is entitled to compensation for services rendered." (R. 85.)

* * * * * * *

"So I don't think that is any basis for any determination by the court, other than the fair and reasonable value of the services necessarily rendered by Mr. Welch and his associates in connection with this litigation." (R. 86.)

The petitioners accordingly did not deny in the District Court, and indeed do not deny on their present petition to this Court, that the respondents were entitled to compensation for "the fair and reasonable value of the services" (R. 86).

The District Court rendered an oral decision on the application for allowance, stating:

"The Court: Well, I feel that I am as adequately prepared to make the allowance today as I would be at any other time, as I have thought these petitions over. On the Welch petition, I am going to allow $75,000." (R. 88.)

On the appeal therefrom to the Circuit Court of Appeals, the petitioners herein contended that the compensation

awarded to the respondents was in excess of the value of the services they performed and should be reduced (R. 245). The Securities and Exchange Commission filed a brief with the Circuit Court of Appeals, stating at page 1 the following:

> "During the hearing on allowances in the District Court, * * * The question of allowances to the other attorneys [the respondents herein] was discussed generally and without specific recommendation by the Commission representatives, and we take no position on these allowances on the present appeal."

The Circuit Court of Appeals, which was fully familiar with all of the facts and circumstances of the situation, because of the prior appeal considered and determined by it, characterized the services of respondents and of counsel for intervenors as follows:

> "The Trust was merely a nominal defendant and the purposes of the suits brought by Stratton and by the S.E.C. were to protect its assets from the manipulations of the officers and trustees, who were charged with gross misconduct and gross abuse of trust, and, by the appointment of receivers and the issuance of an injunction, to remove the corpus of the Trust from any further abuse and place it in the hands of persons who would work for its security and protection. * * * The Trust was insolvent and Hanlon and his associates were interested in continuing control for their own benefit and not for the benefit of the Trust." (R. 246.)

> "In the proceedings which resulted in the appointment of receivers, the complainants sought to rescue the Trust from waste and destruction arising from the

neglect or misconduct of the officers and trustees. The record in the *Stratton* case and the efforts of Mr. Welch and his colleagues greatly aided in the successful prosecution of the Commission's case, both in the District Court and in this court. Mr. Rowlings and Mr. Palmer of Koontz & Koontz participated in the preparation and trial of the *Stratton* case and their efforts too were of great assistance in the preservation and protection of the corpus of the Trust. They also presented a brief as *amici curiae* in the Circuit Court." (R. 245.)

Extraordinary benefits have accrued to the holders of Aldred Investment Trust securities as a result of these proceedings. Not only has the Trust been freed from the domination of faithless trustees, but the liquidation of the Trust will be effected at a moment when the Trust has achieved its peak of solvency, a condition which otherwise might well have been transitory (R. 215).

The assets of the Trust have been brought into court and the debenture holders have been liberated from a situation where they were "helpless under the terms of the debenture agreement to halt the dissipation of their assets * * *" and where they "could not expect relief either by way of *bona fide* recapitalization or liquidation" (R. 133).

As above indicated, debenture holders will now receive, not only the full face amount of their debentures, but also a substantial payment as a liquidating dividend on their shares of beneficial interest.

The tribunal best qualified to appraise the value of the services of the respondents was the District Court. Necessarily implicit in its order granting compensation to the respondents must have been the finding that their services in fact contributed greatly to the final result. The value

of the services of the respondents has also been acknowledged and affirmed by the Circuit Court of Appeals, as above noted. In view of the extent and nature of the services of the respondents, the importance of the issues involved, the extraordinarily successful results, the time spent, and the fact that the District Court had full opportunity personally to observe and appraise the value of the services, the award by the District Court was clearly in the exercise of its sound discretion.

Petitioners' Claims.

Petitioners assert (p. 5) that the record "does not show what services were performed, or the necessity for them, or their value." This assertion is clearly in error. The services performed are fully set forth by Mr. Welch at pages 65 to 75 of the record. We cull from Mr. Welch's statement the following highlights of the services performed:

> "Mr. Bernstein of the New York Bar and Mr. Cook were called into this case in February of 1942. That was shortly after Mr. Hanlon had secured control of the Aldred Investment Trust." (R. 66.)
>
> "They first considered, quite aside from what later developed in respect to the race track, what means there were at their disposal to wrest this Trust from Hanlon and his associates, because with great clarity of vision they saw that there was trouble ahead if he were in there. They first, as I have indicated, considered whether or not they could have bankruptcy. They made a careful study of the whole thing and they concluded that that route was fraught with grave difficulties." (R. 66-67.)

"Then another time came that the purchase of the racetrack came to their attention, and they decided that every fear they had entertained about the Trust was now materializing and that there was but one course open, not bankruptcy, but the suit that was here brought on behalf of Mr. Stratton.

"I would like to say to your Honor that that was an important and a grave decision on their part. They were men wise enough to see enormous difficulties. They could see, for example, that Hanlon would engage the most eminent counsel at his command at the Boston Bar to fight them. They could foresee that there would be every possible appeal if there were success in the lower court. They could look with some alarm at the war chest, which was the fund itself, which so far as they knew could be expended and would be expended in fighting them." (R. 67.)

"It was not until those years of work by Mr. Cook and Mr. Bernstein had been spent on this case—and by no means all of those years but portions of their time through those years—that I was called into the case." (R. 68.)

"• • • I found • • • a complicated matter indeed, with heavy preparation necessary. A good deal of it had been done by Mr. Cook and Mr. Bernstein, but it was necessary to go through the voluminous mass of papers which included every record we could get hold of, of the Trust itself and of the Racing Association, applications to the S.E.C. to reorganize, the taking of depositions of all these reluctant trustees and prying out of them such information as we could. And time certainly was poured into the case in preparation before it came before your Honor for trial.

"As to the trial, I shall certainly say nothing. Your Honor heard every word of it. You have either a good opinion, a mediocre opinion or a bad opinion of what was done.

"After the trial, we of course followed the litigation, as your Honor is aware. We did not, however, argue in the Circuit Court of Appeals, but we did prepare a brief amicus, which was filed. * * *" (R. 68.)

"And once again, yesterday I looked at that brief with some satisfaction as I saw many of those arguments reflected in the court's opinion." (R. 69.)

"Let it not be said, either, that all the winning that the bondholders have had has been granted to them by a bull market and by the craze for racing. I am not contending that the bull market and the craze for racing has not been an enormous advantage to them. Let this never be forgotten, that this litigation allowed them to capture that at what I conceive to be its peak. And if Mr. Hanlon were in control of this situation today, they could look with all the pleasure they could muster at their pieces of paper and they could wait until the inevitable bear market comes and the inevitable slump in racing, or the State legislating it out of existence." (R. 72.)

"I thought it was proper for me to state to your Honor the number of hours spent on the case. Mr. Bernstein in New York, from the time he came into the case up until yesterday, and not including his being here today, spent just about 1000 hours. Mr. Cook spent just about 800 hours. With a slight blush on my face I can only claim for myself and my partners about 300 hours. The explanation is, however, that they

were in the case so much longer than I was and had done so much in preparation before I came into it." (R. 74.)

"It is with some embarrassment that I say to your Honor that there is not perfect unanimity among my group as to what would be a fair fee. To some extent I am stating figures distinctly less than one of us thinks, perhaps less than two of us thinks. It is my opinion that a fair fee would be $125,000." (R. 78.)

The record is complete with respect to the services performed, the necessity for them, and their value. Finally, as stated in the affirming opinion of the Circuit Court of Appeals, the District Court "had intimate, personal knowledge of the services rendered." (R. 245.)

Each of the respondents was present in court at the fee hearing (R. 64, 74) and was available for examination by petitioners' counsel, but he elected not to examine any of the respondents, nor did he at that time raise any objection to the form of the petition for allowance or the proceedings thereon, which he now raises for the first time in this Court.

Petitioners' final claim is that the services "consisted only in initiating the *Stratton* suit" (p. 17) and could not "have justified an allowance of $75,000" (p. 5). The petitioners throughout their petition assert that the only services rendered by the respondents consisted in initiating the Stratton suit. This assertion is clearly erroneous. The respondents took voluminous depositions in the Stratton case, made thorough investigations of all the facts, prepared the case fully for trial and engaged in an extended trial of the case before the District Court (R. 68). After such trial, all of the testimony, depositions and exhibits in that case were incorporated into and added to

the testimony in the S.E.C. case. After the decision by the District Court, the respondents participated in the appeal to the Circuit Court of Appeals to the extent of filing a brief *amici curiae,* seeking affirmance of the judgment of the District Court (R. 68).

A comparison of the record of the proceedings in the Stratton case and the S.E.C. case indicates that the issues on which the S.E.C. case was decided were fully developed in the Stratton case, and that the additional evidence offered in the S.E.C. case was either of minor importance or merely an elaboration of testimony in the Stratton case.

The extent to which the work of respondents was reflected in the actual decision of the District Court is clearly brought out by a comparison of the allegations in the Stratton complaint with the findings of the Court in the S.E.C. case. The appendix hereto annexed shows a decided parallelism between a major portion of the Court's opinion and the allegations of the Stratton complaint, and it is believed demonstrates a relationship of cause and effect between the services of respondents and the judgment that was entered.

S.E.C. frankly stated that "we feel that Mr. Welch and his colleagues made a very substantial contribution to the Securities and Exchange Commission case" (R. 84, 85). While counsel for the Commission also stated that the S.E.C. suit was instituted on the basis of its own investigation, he made it clear that the successful trial of the S.E.C. case was greatly aided by the efforts of counsel in the Stratton case.

The affirming decision of the Circuit Court clearly recognizes the value of the services of the respondents and the justification for the award to them. The Circuit Court said:

> "In the proceedings which resulted in the appointment of receivers, the complainants sought to rescue

the Trust from waste and destruction arising from the neglect or misconduct of the officers and trustees." (R. 245.)

"At the conclusion of the trial [of the Stratton case], which was held in June, 1944, decision was reserved until the case of the *Securities and Exchange Commission* v. *Aldred Investment Trust et al.*, which had been filed on May 19, 1944, was tried. Under a stipulation entered into by the parties all the testimony, depositions and exhibits in the *Stratton* case were incorporated into and added to the testimony in the S.E.C. case * * *" (R. 243.)

"The record in the *Stratton* case and the efforts of Mr. Welch and his colleagues greatly aided in the successful prosecution of the Commission's case, both in the District Court and in this court." (R. 245.)

The Circuit Court of Appeals emphasizes the fact that the efforts of the respondents "were of great assistance in the preservation and protection of the corpus of the Trust" (R. 245).

Question Presented.

Should this Court review a judgment of the Circuit Court of Appeals for the First Circuit affirming an award of compensation made to the respondents by the District Court in the exercise of discretion, where no abuse of discretion is shown, and the only question that this Court would be called upon to determine is the reasonableness of the compensation awarded to the respondents for professional services rendered in bringing the assets and property of Aldred Investment Trust valued at about $8,500,000,

under the jurisdiction of the District Court, and into the possession of a receiver appointed by that Court for the purpose of liquidation of the Trust and distribution of the proceeds thereof to the security holders?

Point I.

The Case does Not Involve Any Question of Law which Requires a Determination by This Court.

As above indicated, the decision of the District Court awarding an allowance to the respondents rested in the discretion of the Court. On appeal to the Circuit Court of Appeals, no abuse of discretion was shown. To the contrary, it was clear that the District Court had duly exercised its sound discretion in granting the award of compensation to the respondents.

The Circuit Court of Appeals for the First Circuit affirmed the allowance to the respondents, and this affirmance does not present any reviewable question in this Court. This is manifest from the following quotation from the decision of the Circuit Court of Appeals (R. 245):

> "The allowance of the above fees rests in the sound discretion of the district court and considerable latitude should be allowed. *May* v. *Midwest Refining Co.*, 121 F. (2d) 431 (C.C.A. 1st, 1941), cert. denied 314 U.S. 668 (1941) citing *Trustees* v. *Greenough*, 105 U.S. 527, 537. See also *Colley* v. *Woolcott*, 187 Fed. 595 (C.C.A. 8th, 1911); Hornstein, *The Counsel Fees in Stockholder's and Derivative Suits* (1939), 39 Columbia Law Review 784. Where the trial judge has personal knowledge of the various proceedings in the litigation and a thorough understanding of the character of the services rendered, he should have a broad discretion in such matters. *Gochenour* v. *Cleveland Ter-*

minal Bldg. Co., 142 F. (2d) 991, 995 (C.C.A. 6th, 1944), cert. denied 323 U.S. 767 (1944). After reviewing the record and considering the objections made to these allowances, we are unable to say that they are excessive or unreasonable, or that the trial judge, who had intimate, personal knowledge of the services rendered, abused his discretion in making them."

The above decision of the Circuit Court of Appeals affirming the exercise of discretion of the District Court does not involve any question of law that may be determined by this Court.

Point II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE IS NOT AT VARIANCE WITH ANY OF THE DECISIONS OF THIS COURT IN ANALOGOUS SITUATIONS.

In point of fact, the decision of the Circuit Court of Appeals affirming the District Court in this case is in consonance with the decisions in this Court to the effect that, where representatives of a class have intervened for the benefit of all, and have created or preserved a fund for the benefit of a class, the representatives are entitled to have their costs and fees made a charge upon the fund.

Trustees v. *Greenough*, 105 U.S. 527.
Sprague v. *Ticonic National Bank*, 307 U.S. 161.
Hobbs v. *McLean*, 117 U.S. 567.

In the *Greenough* case, this Court said at pages 532-533:

"But in a case like the present, where the bill was filed not only in behalf of the complainant himself, but in behalf of the other bondholders having an equal in-

terest in the fund; and where the bill sought to rescue that fund from waste and destruction arising from the neglect and misconduct of the trustees, and to bring it into court for administration according to the purposes of the trust: and where all this has been done; and done at great expense and trouble on the part of the complainant; and the other bondholders have come in and participated in the benefits resulting from his proceedings,—if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interest. He may be said to have saved the fund for the *cestuis que trust,* and to have secured its proper application to their use. • • •

"It is a general principle that a trust estate must bear the expenses of its administration. It is also established by sufficient authority, that where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts."

In the *Sprague* case, this Court said at page 166:

"Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation.[5]

[5] For examples of the discretionary nature of the authority of equity to tax costs, see 3 Daniell's, Chancery Pleading and Practice (2d ed.) 1381-1410; 2 Street, Federal Equity Practice §§1994-2007."

Point III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE IS NOT AT VARIANCE WITH ANY OTHER DECISIONS OF ANY CIRCUIT COURTS OF APPEALS IN ANALOGOUS SITUATIONS.

As above indicated, the decision of the Circuit Court of Appeals in this case determined:

> "After reviewing the record and considering the objections made to these allowances, we are unable to say that they are excessive or unreasonable, or that the trial judge, who had intimate, personal knowledge of the services rendered, abused his discretion in making them." (R. 245.)

In addition to the authorities cited in the Circuit Court of Appeals decision, the following cases demonstrate that the various Circuit Courts of Appeals have consistently refused to review allowances where no abuse of discretion is shown.

Thus in *In re Standard Gas & Electric Co.*, 106 F. 2d, 215, the Circuit Court of Appeals for the Third Circuit stated at page 216:

> "Upon appeal from an allowance under the statute the only question before us is whether the district court abused its discretion in making the allowance * * *."

Similarly, in *In re Sovereign Corporation*, 114 F. 2d, 1013, the Circuit Court of Appeals for the Seventh Circuit stated at page 1014:

> "We also recognize in this case that our discretion should not be exercised in favor of an appeal except

where it appears there has been an abuse of discretion on the part of the lower court in determining the amount of fees allowable."

Likewise, in *Singer* v. *General Motors Corporation,* 136 F. 2d, 905, the Circuit Court of Appeals for the Second Circuit, in a stockholders' derivative suit resulting in a successful compromise for the plaintiffs, affirmed an allowance of $10,000 to one of the attorneys, stating:

"the district judge has awarded $10,000 for this service, and we cannot say that that was so little as to make its allowance an abuse of discretion."

Like determinations have been made by the Circuit Court of Appeals for the Ninth Circuit in *In re American Mail Line,* 115 F. 2d, 196, and by the Circuit Court of Appeals for the Fourth Circuit in *Milbank, Tweed & Hope* v. *McCue,* 111 F. 2d, 100. In *Newman* v. *Ambassador Apartments,* 101 F. 2d, 308 (3d Cir.), Judge Maris said:

"Upon appeal this court may not consider the allowance de novo or substitute our discretionary judgment as to their amount for that of the District Court. We are confined to the determination of the single question, whether the District Court abused its discretion in making the allowances appealed from to the extent that it can be said that it completely ignored the factors which it should have considered and reached a result in manifest disregard of right and reason."

The only objectors to the allowances herein are the petitioners, who recently acquired their stock from Hanlon,

the deposed trustee. The Securities and Exchange Commission, which is the plaintiff in this litigation and is the government agency having jurisdiction in the premises, did not object to the allowances to the respondents in the District Court, but affirmatively supported such allowances. In its brief in the Circuit Court of Appeals, the Commission stated: "We take no position on these allowances on the present appeal." Likewise the Receivers, who are the officers of the Court charged with the administration and preservation of the assets of the Trust, made no objection to the allowances to the respondents or the amount of such allowances, either in the District Court or in the Circuit Court of Appeals.

Point IV.

THE CIRCUIT COURT OF APPEALS IN THIS CASE HAS NOT DEPARTED AT ALL FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION IS ENTIRELY UNNECESSARY.

As above shown, the decision of the District Court, awarding an allowance to the respondents for services rendered, rested in the sound discretion of the District Court. Upon appeal the Circuit Court of Appeals affirmed, reciting the valuable services rendered by the respondents, and determined that there was no abuse of discretion by the District Court in awarding such allowance. The petition to this Court is void of any showing of abuse of discretion by the District Court. The petition seeks to have this Court fix the value of the respondents' services, in lieu of the District Court. This Court should accordingly reject such petition.

It is accordingly respectfully submitted that the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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Appendix A.

Excerpts from Stratton Complaint.

"The nature of the business of the Trust . . . consists principally of the purchase and sale for investment purposes of securities of public utilities, industrial corporations and other high-grade investments of a conservative type and character." (R. 90.)

"In or about the month of October, 1941, the respondent, Gordon B. Hanlon, by the use of the sum of less than $20,000, designed, managed and contrived to purchase and acquire the ownership of 110,000 common shares of no par value of the Trust with voting power, or approximately 64% of all of the common shares of the Trust with voting power. At the time of such acquisition, the said Trust had total assets of approximately $2,250,000 with which to meet its debenture indebtedness of $5,900,000, and the Trust was accordingly insolvent to the extent of $3,650,000. The sole purpose and the scheme of said Hanlon's acquisition of said voting control of the Trust was to obtain and have full power, control and disposition of its business, assets and affairs for his own personal benefit and enrichment. In pursuance of such voting control, said Hanlon in or about November, 1941, caused himself and the other individual respondents,

Excerpts from District Court's Findings.

"Between the years 1927 and 1943, inclusive, the Trust's investments were confined largely to the securities of well-known public utility and industrial companies, in most cases listed on securities exchanges and readily marketable." (R. 120.)

"On October 1, 1941, the defendant Gordon B. Hanlon, . . . purchased the 110,000 common shares for approximately $10,000 at a public auction conducted on behalf of the Chase National Bank as foreclosing pledgee. This block represented more than 60% of all the outstanding common shares of the Trust. At the time of Hanlon's purchase the market value of the Trust assets was substantially less than the face amount of the outstanding debentures, . . . Although the common shares now held by Hanlon had no asset value, they constituted voting control of Aldred with the attendant power to elect and remove trustees and officers, to fix the compensation of the latter, and to dominate completely the policies of the Trust. The real value in these shares lay in their control of the Trust's policy, the Trust's assets, and the ability to direct the overhead management costs. Such control was in fact exercised by Hanlon

Excerpts from Stratton Complaint.

who are his personal associates and subordinates, to be elected and designated as the trustees of the Trust, and they have since acted and served as such trustees." (R. 90-91.)

"Upon acquiring control of the Trust . . . , Gordon B. Hanlon caused himself to be elected as president of the Trust, his nominee John L. Arnold as vice-president and treasurer, and his nominee Robert P. Loring as secretary of the trust, and caused salaries to be paid to them by the Trust, principally to himself, of $9,249.99 for the year 1942 and $11,700 for the year 1943 . . . Said salaries so paid to the respondents were not at all commensurate with any services that they may have performed in behalf of the Trust and were greatly in excess of the reasonable value of any such alleged services. In addition, the said respondent Hanlon has caused the Trust to pay to the five individual respondents a total of $6,000 a year as trustees of the Trust." (R. 91.)

"Further, since acquiring control of the Trust, said respondent Hanlon has caused the Trust to pay to his firm, Gordon B. Hanlon & Co., the sum of $4,920 per annum for alleged office facilities furnished by his company to the Trust, which sum is greatly in excess of the value of any such facilities." (R. 91.)

Excerpts from District Court's Findings.

through the selection of a group of close friends to serve as trustees. At all times the Trustees have been subject to Hanlon's wishes and directions." (R. 122.)

"Late in 1941 the trustees elected the defendant, Gordon B. Hanlon, president of the Trust, the defendant Arnold, vice-president and treasurer, and the defendant, Loring, secretary. . . . During the year 1942 the officers received $9,249.99 as salaries, including $5,500 to Gordon Hanlon as president, the amount voted by the trustees. The trustees received $6,000 as compensation, this being provided for in the Trust agreement. During 1943 the trustees' fees remained the same, but the salaries of officers were increased by the trustees to $11,700, including $6,900 to Hanlon. For the first half of 1944 trustees' fees were $3,000, and salaries of officers $5,850.00. Hanlon's salary as president was in excess of the salaries paid to the presidents of the Trust in prior years." (R. 122-123.)

"The Trust was charged $410 per month by Hanlon for the use of office space and facilities which had hitherto been available to Gordon B. Hanlon & Company, plus the use of one additional adjoining room. . . . Payments by the Trust to Gordon B. Hanlon & Company for office facilities have been at the

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"During the year 1942, the Trust had . . . only $169,616.71 to meet the interest for said year upon its said debentures, which interest amounted to $265,500. Accordingly, said debenture interest was to the extent of $95,883.29 paid out of the capital of the Trust. . . . During the year 1943, . . . said debenture interest was to the extent of $99,923.80 paid out of the capital of the Trust." (R. 91-92.)

"Although the Trust was hopelessly insolvent at the time of the acquisition by said respondent Hanlon of voting control thereof as aforesaid, and has continued so to be up to the date hereof, yet said respondent Hanlon, in pursuance of his purpose and scheme aforesaid and in order to keep his entrenched hold upon the assets, property and affairs of the Trust and to obtain for himself and the other individual respondents the personal benefits and enrichment hereinabove and hereinafter alleged, has continued the existence of the Trust and has continued payment of said debenture interest out of its capital, and said respondent Hanlon intends so to do, to the detriment and against the interests of the holders of said debentures." (R. 92.)

Excerpts from District Court's Findings.

yearly rate of $4,920, and up to June 30, 1944, have totaled $12,-874." (R. 123.)

"For the years 1940 to 1943, inclusive, the earnings of the Trust have been substantially insufficient to meet the interest requirements on its outstanding debentures. During this period the Trust paid out an aggregate of $1,062,945.13 as interest to the debenture holders of which $479,775.42 was derived from the sale of assets of the Trust." (R. 121.)

"When Hanlon purchased the control of the Trust the common shares had no equity position. The enterprise belonged to the debenture holders. Yet Hanlon's purchase enabled him to exercise dominion and control over the management and investment policies of the Trust. . . . Furthermore Hanlon, with the concurrence of the other defendants, has dictated policies with regard to the portfolio securities of the Trust which are contrary to the interests of the debentures from earnings the management has liquidated substantial amounts of high-grade portfolio securities to pay interest and management expenses. In reality, this is not interest to the debenture holders but is a return of the capital of the Trust in the guise of interest." (R. 132-133.)

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"The assets, liabilities, capital structure and financial condition of the Trust as at the end of the years 1941, 1942 and 1943 are as set forth on the photostatic copies of balance sheets and statements of surplus and profit and loss for each of said years, annexed hereto, made a part hereof, and marked respectively Exhibits A, B and C. Since the year 1940 the Trust has sustained a loss in its operations as a result of which the capital assets of the Trust have been substantially and materially impaired, and at the present time the market value of the assets of the Trust is sufficient to pay only about 50% on the liabilities of the Trust . . ." (R. 92.)

". . . said trustees of the Trust have been using capital rather than income to pay the interest on the Trust's debenture indebtedness, and were and are thus consuming the Trust's resources and substance, and will continue so to do unless relief is granted as herein prayed." (R. 93.)

". . . Hanlon in or about the month of January, 1944, insti-

Excerpts from District Court's Findings.

"The following table indicates from 1937 to 1944, inclusive, the asset value for each $1,000 principal amount of outstanding debentures, i.e., the value of the assets that would be distributed to each $1,000 principal amount of debentures if the Trust were to be liquidated and its assets distributed to its security holders:

As of December 31	Asset value per $1,000 Debenture
1941	362.66
1942	444.32
1943	559.98"

(R. 121.)

"Yet so long as the management sells portfolio securities of the Trust and distributes the proceeds to the debenture holders as ostensible interest, no technical act of default has occurred. The debenture holders are left helpless under the terms of the debenture agreement to halt the dissipation of their assets. As long as the personal advantage of Hanlon and the other defendants stood in the way the debenture holders could not expect relief either by way of bona fide recapitalization or liquidation." (R. 133.)

"Early in December of 1943 Hanlon commenced negotiations

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tuted negotiations for the acquisition of working control of Eastern Racing Association, Inc., . . . engaged in conducting a horse-racing track commonly known as Suffolk Downs, . . . intending to employ the assets of the Trust in connection with such acquisition, and for the sole purpose of electing himself president of the Racing Association and his subordinates as junior officers of such association with the large salaries, emoluments and privileges flowing to them therefrom and with control over the assets, property and affairs of said association for their own personal benefit and advantage." (R. 93.)

". . . Hanlon purported to convene an annual meeting of the shareholders of the Trust on January 24, 1944. At such meeting, dominated and controlled by said respondent Hanlon as aforesaid, owning 110,000 out of the 171,500 of common shares with voting power, he caused a resolution to be adopted purporting to give the trustees of the Trust wider authority in respect to investing the funds of the Trust." (R. 93.)

"The said resolution was illegally adopted and null and void, in that no due notice of the proposed adoption of said resolu-

Excerpts from District Court's Findings.

with C. F. Adams and V. C. Bruce Wetmore, owners of the majority of the voting stock of Eastern Racing Association which operated the Suffolk Downs horse racing track in East Boston." (R. 125.)

"On February 18 the defendants, through the Trust's control of Eastern, were elected as directors or officers of Eastern Racing Association, G. B. Hanlon, Higbee, Bowen, Hart and Loring were elected directors, and Hanlon was elected president, Arnold treasurer, and Loring, vice-president, of Eastern Racing Association." (R. 129.)

"Hanlon was attracted to Eastern Racing by the prospects of high salaries and other benefits for himself and his nominees." (R. 133.)

"On January 24, 1944, at 9 A.M. the meeting of the shareholders was held, at which 110,090 shares out of a total of 171,500 shares outstanding were represented. By a vote of 110,050 shares, of which 110,000 shares belonged to Gordon B. Hanlon, a resolution was adopted to change the investment policy as recommended by the trustees." (R. 127.)

"Instead of fulfilling this obligation to the holders of the debentures, the defendants pursued a positive program of con-

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tion was given by the respondents to the shareholders of the Trust, nor did they (the defendants) disclose to the shareholders in the notice of the meeting or in advance of the meeting or at the purported meeting that the respondent Hanlon had instituted negotiations for the acquisition of Suffolk Downs and intended to utilize the purported enlargement of the powers of the trustees for the purpose of acquiring such race-track for and at the expense of the Trust." (R. 93, 94.)

"The aforesaid purported attempt of the respondent Gordon B. Hanlon (a) to alter and change the terms and provisions of the trust agreement of November 7, 1927 (b) to enlarge the powers of himself and his said nominees as Trustees of the Trust (c) to limit and reduce their duties and obligations as trustees and (d) to exculpate them from responsibility and liability thereunder was null and void . . . and in violation of the provisions of the United States Investment Company Act of 1940." (R. 94.)

"Subsequent to the purported adoption of said resolution and in or about February 1944, said respondent Hanlon, with the consent and acquiescence of the other trustees of the Trust, caused it to sell a substantial number of shares of common

Excerpts from District Court's Findings.

cealment. The intention to alter the basic investment policy of the Trust was announced to the shareholders in a masterful bit of understatement. . . . Not one ray of light as to the defendants' intentions was revealed to the debenture holders. Even the name of the Eastern Racing Association was not allowed to be entered in the trustees' minutes." (R. 134-135.)

"The concentration of so large a proportion of the Trust's assets in one investment was a radical departure from the policy of diversification which had been previously followed, and from the declarations of policy set forth in the registration statement first filed with the Securities and Exchange Commission. The same is true of the investment in another company for the purpose of exercising control or management." (R. 134.)

"To raise the cash required for the purchase of 50.3% of the voting securities of Eastern Racing Association the Trust sold between January 7 and February 7, 1944, more than 30% of the Trust's assets, including 10,000 shares of Pennsylvania

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stock of Consolidated Gas Electric Light and Power Company of Baltimore and Pennsylvania Water and Power Company, which had been owned by the Trust since its inception in November 1927, and which securities were commonly accepted and regarded as high-grade securities for investment purposes . . ." (R. 94.)

". . . the proceeds thereof were caused by said respondent Hanlon to be employed in the purchase and acquisition in the name of the Trust, at inflated and excessive prices, of 10,994 shares of stock of said Eastern Racing Association, Inc." (R. 94.)

"The said Racing Association stock is not a security and its activities are not the type of enterprise in which the Trust and its trustees can properly invest the funds and assets of the Trust; in essence it represents a sporting pastime that is subject to, and based solely on, special license granted by, and subject to the will of, the people of the Commonwealth of Massachusetts by public referendum conducted once every four years." (R. 95.)

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Water and Power Company, 5,000 shares of Consolidated Gas Electric Light & Power Company of Baltimore, and 3,000 shares of Eastern Gas and Fuel Associates." (R. 127.)

"Large blocks of the best securities in the portfolio were thrown on the market at prices below those which probably could have been obtained through a more orderly process of disposal." (R. 133.)

"To acquire the controlling interest in Eastern Racing Association the Trust had to pay $80 per share. From November 1943 through February 1944 published bid prices for the common stock of Eastern Racing ranged between $52 and $59 per share." (R. 130.)

"The horse racing industry is considered a questionable enterprise by large segments of the public. Investment trusts of the Aldred type do not have controlling blocks of racing stocks in their portfolios. The racing business is exposed to certain disabilities not encountered by other businesses." (R. 134.)

". . . Its operation is contingent upon the securing of a license from the Massachusetts State Racing Commission. . . . Furthermore, the County of Suffolk in Massachusetts conducts a quadrennial referendum on the horse racing question." (R. 130-131.)

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". . . stocks of the kind recently acquired in said Eastern Racing Association, Inc. have not heretofore been purchased or dealt in by the said Trust . . ." (R. 95.)

". . . that the purpose . . . of . . . Hanlon and his . . . associates in acquiring the stock of said Eastern Racing Association, Inc. was and is to enable them to hold high positions in said association, and to receive for their own personal benefit and use the substantial salaries which the officers of the said association, . . . have heretofore received." (R. 95-96.)

". . . the shares of said association are of such nature and character as to be outside of and beyond the scope of investments by trustees and other fiduciaries generally in the exercise of sound discretion, . . ." (R. 96.)

". . . that the individual respondents have willfully and deliberately caused gross and wanton waste in the management of the business and affairs of the Trust, that they have grossly and wantonly abused the Trust which they assumed, and the duties and obligations thereof imposed upon them by law and under the said Trust agreement." (R. 96.)

Excerpts from District Court's Findings.

"The acquisition of the control of this track, being a departure from their former investment policy, necessitated an amendment of the statement of policy with respect to investments as filed with the Securities and Exchange Commission. . . ." (R. 125.)

"In acquiring control of Eastern Racing the defendants knew that Adams and Wetmore, as president and treasurer, respectively, had each received salaries of $25,000 per year and bonuses of an additional $25,000 each." (R. 129.)

"Hanlon was attracted to Eastern Racing by the prospects of high salaries and other benefits for himself and his nominees." (R. 133.)

"The purchase of the control of Suffolk Downs took the Trust from concentration in utilities into concentration in horse racing, not merely for investment but for control." (R. 135-136.)

"(1) I find and rule that Gordon B. Hanlon, as President of the Aldred Investment Trust and, during 1943 as a trustee of the Aldred Investment Trust and continuing as such until January 17, 1944, has been guilty of a 'gross abuse of trust' within the meaning of Section 36 of the Investment Company Act of 1940.

Excerpts from Stratton Complaint.	*Excerpts from District Court's Findings.*
	"(2) I find and rule that Robert P. Loring, Elton N. Hanlon, W. Edward Higbee and Malcolm M. Bowen, who were all trustees prior to January 17, 1944, were guilty of 'gross abuses of trust' within the meaning of Section 36 of the Investment Company Act of 1940." (R. 136.)
Complaint prayed for appointment of receiver of the property and assets of the Trust for purposes of liquidation. (R. 97.)	Court appointed a receiver of the property and assets of the Trust for purposes of reorganization or liquidation. (R. 137.)
Complaint prayed that defendants be enjoined from interference with trust property and assets. (R. 97.)	Court granted prayer enjoining defendants from service or acting in capacity of trustee or officer of the Trust. (R. 137.)